Supreme Court, U.S.
FILED
JUN 4 1997
OFFICE OF THE CLERK

(2)

No. 96-1765

In The
Supreme Court of the United States
October Term, 1996

THOMAS TATE,

Petitioner,

v.

WALTER McMILLIAN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. When resolving a summary judgment motion in a case under 42 U.S.C. § 1983 where the underlying constitutional tort involves an element of intent, is a District Court absolutely prohibited from considering the issue of intent when reviewing the factual merits of the case simply because the defendant is a public official, even where the separate qualified immunity analysis of what law is clearly established has been conducted under an objective standard?

2. Must a law enforcement officer who has punished a pretrial detainee for a year prior to his trial by putting the detainee on Death Row nevertheless be granted qualified immunity simply because there is no prior case law involving an identical or very similar factual context, even where prior case law made it clear to all reasonable public officials that they cannot impose conditions of confinement on pretrial detainees for the purpose of punishing them?

TABLE OF CONTENTS

STATEMENT 1

ARGUMENT 4

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 13, 14

Bell v. Wolfish, 441 U.S. 520 (1979) 3, 6

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 8, 9

Johnson v. Jones, 515 U.S. 304 (1995) 7, 8

McMillian v. Johnson, 88 F.3d 1573 (11th Cir. 1996) 2, 3

McMillian v. Monroe County, 117 S.Ct. 554 (cert. granted Dec. 6, 1996) *3*

McMillian v. State, 616 So.2d 933 (Ala. Cr. App. 1993) 1

McMillian v. Tate, No. 96-1756 3

Mitchell v. Forsyth, 472 U.S. 511 (1985) 2, 7

United States v. Lanier, 117 S.Ct. 1219 (1997) 13

Washington v. Davis, 426 U.S. 229 (1976) 10

STATUTES & RULES

42 U.S.C. Section 1983 2

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Walter McMillian was tried, convicted, and sentenced to death for a crime he did not commit. He spent six years on Alabama's Death Row. Over a year of this time on Death Row was spent before he even went to trial on the capital murder charges against him. In February of 1993, the Alabama Court of Criminal Appeals reversed his capital murder conviction and death sentence after it was established that critical evidence corroborating his claim of innocence had been withheld by government officials. *McMillian v. State*, 616 So.2d 933 (Ala. Cr. App. 1993). A few days later, the State of Alabama dismissed the charges against Mr. McMillian and he was freed

from imprisonment. Pet. App. 5a. The State began a new investigation to find the real perpetrator of the murder. *See, McMillian v. Johnson*, 88 F.3d 1573, 1575-1576 (11th Cir. 1996).

This civil case was filed in the United States District Court for the Middle District of Alabama by Mr. McMillian under 42 U.S.C. Section 1983 against various governmental officials involved in his arrest and incarceration, including Thomas Tate, who is the Sheriff of Monroe County, Alabama. In addition, Monroe County was named as a defendant. The case seeks damages for violations of federal constitutional rights as well as various state law torts stemming from wrongful conduct in connection with Mr. McMillian's arrest and incarceration, including the pretrial detention on Death Row, the manufacture of inculpatory evidence, and the suppression of exculpatory evidence. Pet. App. 2a, 5a-11a.

Motions to Dismiss by each of the individual defendants were denied in whole or in part by the District Court. However, Monroe County's motion to dismiss was granted. The District Court then entertained motions for summary judgment by the remaining defendants, granting the motions in part and denying them in part in a lengthy January 17, 1995 opinion. Because some of the denials of summary judgment involved issues of qualified immunity, Sheriff Tate and some of the other defendants appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In addition, petitioner McMillian sought certification with respect to various issues. The District Court and the Eleventh Circuit then granted the certification with respect to the issues raised by petitioner McMillian, including the county liability issue. *See, McMillian v. Johnson*, 88 F.3d 1573, 1576 (11th Cir. 1996).

After briefing and argument, the Court of Appeals issued

two separate opinions in the two separate appeals. In the certified appeal of the petitioner related to the county liability issue, the Court of Appeals affirmed the District Court's dismissal of Monroe County. *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir. 1996). A timely petition for writ of certiorari was filed from that decision, seeking review of the county liability issue, and this Court granted certiorari in case number 95-542. *McMillian v. Monroe County*, 117 S.Ct. 554 (cert. granted Dec. 6, 1996). This Court's decision on the merits was issued June 2, 1997.

It is the separate qualified immunity appeal of respondent Tate, reported as *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996), that is the subject of the Tate's present petition for writ of certiorari, as well as a separate certiorari petition by McMillian, styled *McMillian v. Tate*, No. 96-1756. Because of various petitions for rehearing, that appeal has been on a very different time track from the appeal upon which this Court already granted certiorari.

The present certiorari petition of Sheriff Tate relates to Count One of the complaint, which accuses Tate of causing McMillian to be placed on Death Row while he was a pretrial detainee in violation of the Due Process Clause of the Fourteenth Amendment. The District Court held that the law is and was clearly established that state officials cannot inflict upon a pretrial detainee adverse conditions of confinement, such as placement on Death Row, for the purpose of punishment. Pet. App. 72a-73a, 93a, *citing, Bell v. Wolfish*, 441 U.S. 520, 536-540 (1979).

The District Court also discussed, in great detail, the conflicting evidence at the summary judgment stage on this issue, concluding there was sufficient evidence of a Fourteenth Amendment violation to preclude summary judgment. More specifically, the Court took account of the evidence that no

pretrial detainee had ever been held on Death Row in Alabama prior to McMillian being placed there; that this sort of detention not only was unprecedented but was in violation of Alabama law; that Tate and his confederates caused and facilitated McMillian's placement on Death Row shortly before an execution occurred and kept him there for the thirteen months preceding his trial; that they also caused and facilitated the pretrial placement on Death Row of Myers, putting and leaving him there when he would not cooperate with them by implicating McMillian and moving him to the local jail when he would cooperate; that Tate had made a number of what the District Court called "threatening and hateful remarks to McMillian"; that an execution occurred shortly after McMillian was put on Death Row and that Tate, Ikner, and Benson soon thereafter said to Myers, "I bet you [McMillian's] ass is so tight you couldn't get a safety pin in there"; that Tate knew placing McMillian on Death Row, particularly during an execution, was, to use the District Court's words, "causing McMillian to suffer psychologically"; that Tate lied to District Attorney Theodore Pearson by stating that McMillian would be unsafe in the local jail, thus causing Pearson to request and obtain from a local circuit judge an order transferring McMillian to the state department of corrections; and that McMillian was placed on Death Row despite the fact that the court order transferring him to the department of corrections did not in any way authorize his detention on Death Row. Pet. App. 75a-84a. *See also* Pet. App. 7a-8a (discussion of evidence by the Court of Appeals).

Accordingly, the District Court denied Tate's motion for summary judgment on Count One. The Court of Appeals affirmed. Tate seeks review of the Court of Appeals' decision by way of his petition for certiorari.

ARGUMENT

With his first issue, Petitioner Tate seems to contend,

despite the fact that intent to punish must be proven by the plaintiff in order to sustain the underlying due process claim, that the District Court should never have considered intent in resolving the summary judgment motion. He acknowledges the unanimity of the courts of appeals that disagree with his position (indeed, none have agreed with it), yet he claims these courts have somehow "open[ed] qualified immunity analysis to subjective considerations." Pet. Cert. 13.

The petitioner's entire argument fails to recognize the distinction between the qualified immunity and clearly established law analysis, on the one hand, and the review of the underlying merits of the claim, on the other. The cases petitioner cites in support of his position, pet. cert. 12-13, make it clear that the question of clearly established law is an objective and not a subjective inquiry. But that is a different inquiry from the question of whether there is sufficient evidence of a particular purpose in a case where such a purpose is an element of the underlying claim. In other words, a reasonable public official is presumed to be aware of clearly established law, and the courts must determine at the summary judgment stage the objective question of whether the law is clearly established, while the subjective question of whether a particular public official knew about the state of the law is irrelevant. That is what is meant by the cases petitioner cites to the effect that the qualified immunity analysis is objective and not subjective. But if the clearly established law holds, for example, that public officials may not act with a racist purpose without violating the equal protection clause, or may not impose disabilities upon pretrial detainees for the purpose of punishment without violating the due process clause, the court must then determine if there is evidence of the relevant purpose sufficient to survive summary judgment.

In this case, the question of whether the clearly established case law prohibited "disabilit[ies] . . . imposed [upon pretrial

detainees] for the purpose of punishment," *Bell v. Wolfish*, 441 U.S. 520, 538 (1978), is an objective one and it is irrelevant whether Tate knew of the clearly established law or not. Given that the law is clearly established, as the District Court and the Court of Appeals held, pet. app. 19a-20a, 93a, the question then arose in the District Court of whether there is evidence, sufficient to survive summary judgment, that Tate imposed disabilities "for the purpose of punishment." That obviously involves an inquiry into his intent and the District Court here held that there is sufficient evidence. Pet. App. 75a-85a. The former is a legal question and the latter is a factual question. The District Court clearly recognized this distinction in its review of the summary judgment motion, first addressing the objective legal question of what law was clearly established, and then addressing the factual question of whether there was sufficient evidence of a violation of that clearly established law to deny summary judgment and proceed to trial.

> If the plaintiffs . . . show that the rights that defendants' conduct allegedly violated were *clearly established* at the time of the defendants' conduct, the court must *then* determine whether the plaintiffs have adduced evidence sufficient to create a genuine issue of fact as to whether defendants actually engaged in conduct that violated clearly established law.

Pet. App. 70a (emphasis added).

Thus, contrary to petitioner Tate's claim, this is not a situation where the lower courts in this case and courts of appeals in other cases have created "exceptions", pet. cert. 15, to the objective qualified immunity standard. Instead, courts have simply recognized the distinction between the qualified immunity inquiry and the inquiry regarding the underlying merits of the claim.

This Court's decisions frequently have emphasized this distinction. In *Mitchell v. Forsyth*, 472 U.S. 511, 527-528 (1985), this Court pointed out that "a claim of [qualified] immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." In *Johnson v. Jones*, 115 S.Ct. 2151, 2157 (1995), this Court said "a claim of [qualified] immunity . . . raises a question that is significantly different from the questions underlying plaintiff's claim on the merits." In *Johnson*, this Court described *Mitchell's* holding that an interlocutory appeal is available where "the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of 'clearly established' law." *Johnson*, 115 S.Ct. at 2155. According to *Johnson*, the Court in *Mitchell* "explicitly limited its holding to appeals challenging, not a district court's determination about what factual issues are 'genuine,' Fed. Rule Civ. Proc. 56(c), but the purely legal issue of what law was 'clearly established.'" *Johnson*, 115 S.Ct. at 2156. In explaining the proper scope of an interlocutory qualified immunity appeal, the Court in *Mitchell* said:

> [An] appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts. . . . All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . . .

472 U.S. at 528.

Indeed, *Johnson* itself recognized that, while the legal issue of qualified immunity -- whether a particular point of law is or is not clearly established -- is an objective one, factual issues underlying the merits of certain constitutional torts will involve questions of intent. In describing the reasons for limiting interlocutory appeals to the legal issues and precluding such

appeals over factual issues, the Court in *Johnson* said:

> [Q]uestions about whether or not a record demonstrates a "genuine" issue of fact for trial, if appealable, can consume inordinate amounts of appellate time. Many constitutional tort cases . . . involve *factual controversies about*, for example, *intent* -- controversies that, before trial, may seem nebulous.

115 S.Ct. at 2158 (emphasis added).

This Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is fully consistent with the understanding that the legal qualified immunity question is an objective one, while the separate question of evidentiary sufficiency on the merits of the underlying constitutional tort claim may involve questions of subjective intent. As petitioner Tate notes, *Harlow* involved a claim of improper retaliation. But contrary to petitioner's contention, the Court in *Harlow* never said that issues of retaliatory motive should be totally precluded from consideration at all stages of a summary judgment motion. Instead, the Court simply said that the initial inquiry in a summary judgment motion should turn on the objective question of clearly established law:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether the law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he be fairly said to "know" that the law forbade conduct not previously identified as unlawful. Until this *threshold immunity question* is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent

public official should know the law governing his conduct.

457 U.S. at 818-819 (emphasis added). And *Harlow* held that this "threshold immunity question" should not be based on the particular official's subjective view of the state of clearly established law, but instead on an objective view of the law, as clearly established, at the time of the alleged violation of that law.

Once the threshold immunity question is resolved, and if it is held that the law was clearly established, then -- as *Harlow* said -- "the immunity defense ordinarily should fail." 457 U.S. at 818-819. The defendant then still can claim, in a summary judgment motion, that there is no evidence -- and therefore no genuine issue of material fact -- that he or she actually did what he or she was accused of doing. Where intent is an element of the underlying claim, a court's examination of the evidence of that intent in no way detracts from the objective nature of the separate qualified immunity analysis dealing with clearly established law. Thus, had it been determined on remand in *Harlow* that, objectively speaking, clearly established law prohibited the sort of retaliation alleged in that case, the defendant still could have asserted on summary judgment that there was no evidence he actually engaged in such retaliation. This would have involved an inquiry into his subjective intent, but that inquiry would not have contravened the objective nature of the separate inquiry into whether the law was clearly established.

So petitioner Tate is completely wrong when he suggests that, under the holdings of the various courts of appeals, *Harlow's* objective qualified immunity standard is being applied only to "non-intent based constitutional claims." Pet. Cert. 19. Instead, the objective question of what law is clearly established is applied to all constitutional claims involving public officials with qualified immunity. If the legal principles they are accused

of violating were not clearly established at the time, summary judgment must be granted in their favor. If the principles were clearly established, there is no qualified immunity, but the defendants may still contend there is insufficient evidence of a violation sufficient to survive their summary judgment motion. The District Court must then look at the relevant evidence, including evidence of intent if that is an element of the underlying constitutional claim. If there is evidence sufficient to survive summary judgment, the claim must proceed to trial. If not, summary judgment must be granted.

Ironically, if petitioner's attempt to confuse the qualified immunity standard with the underlying merits were successful, he would actually weaken the protections of public officials. Under existing law, if a public official is accused of an intent-based constitutional claim, the plaintiff must demonstrate first that clearly established law prohibited what the defendant is accused of (in order to pierce qualified immunity), and second must present evidence that the defendant actually harbored the unlawful intent (in order to survive summary judgment with respect to the merits of the underlying claim). If the intent element were removed altogether from the summary judgment inquiry, a plaintiff could survive the merits of a summary judgment motion without any showing of intent, even where intent is part of the underlying claim. If that were the case, a plaintiff could allege unconstitutional racial discrimination under the Fourteenth Amendment and survive summary judgment without any proof of racial animus. *But see, Washington v. Davis*, 426 U.S. 229 (1976). Similarly, in a case like the present one, the plaintiff simply would need to show that it violates clearly established law to incarcerate a pretrial detainee on Death Row, and then show that he was incarcerated there. Accordingly, then, even if petitioner is right and if intent should never be considered at the summary judgment phase, the District Court was correct in denying him summary judgment, and there is no reason to grant certiorari

As in the lower courts, the petitioner here persists in his confusion of qualified immunity on one hand, and the underlying merits on the other. The District Court and the Court of Appeals rejected his position, and this is not a matter that is appropriate for review on certiorari.

Amazingly, in his second issue, pet. cert. 22-27, petitionerTate asks this Court to grant certiorari so he can press his contention that it does not violate clearly established law to incarcerate a pretrial detainee *on Death Row* for a year *prior to his trial* in order to punish him. The District Court and the Court of Appeals refused to accept such a ridiculous proposition, and it is not a basis upon which this Court should grant certiorari.

The petitioner's request in this regard is based upon an effort to challenge the District Court's summary judgment findings. As the Court of Appeals noted, petitioner Tate has contended all along that he put McMillian on Death Row not to punish him, but for McMillian's own safety. Pet. App. 18a. The petition for writ of certiorari is based upon this continued assertion:

> A case which never directly addresses intent *nor the transferring of a detainee for security purposes* could not have drawn a bright line for law enforcement in 1987 making it obvious that Tate's own participation in McMillian's transfer was unlawful.

Pet. Cert. 26 (emphasis added). Petitioner Tate goes on to claim that the law cannot be clearly established unless there is a prior case condemning a transfer where the detainee's accomplice had been threatened by armed intruders. Pet. Cert. 27. He also claims he was in a "Catch 22" because McMillian needed to be transferred to a more secure facility. Pet. Cert. 26-

27.

However, petitioner Tate's phrasing of the issue is dependent upon his challenge to the District Court's review of the factual record compiled during summary judgment proceedings. As the Court of Appeals explained:

> To the extent that Tate . . . argue[s] that McMillian was transferred for the purpose of ensuring his safety, [he] simply take[s] issue with the district court's conclusion that McMillian has raised a genuine issue of fact as to whether the purpose of the transfer was punishment. As we have explained, we do not address [this] challenge[] to the district court's factual determinations.

Pet. App. 18a. Moreover, even if Tate had an obligation to protect McMillian by transferring him to what Tate calls "a more secure facility," that did not justify *putting him on Death Row* in order to punish him.

The petitioner quite properly notes that he "is *not* contending that he is entitled to qualified immunity unless prior case law with identical facts clearly establishes the unlawfulness of his actions." Pet. Cert. 24 (emphasis added). At the same time, however, he wrongly seems to insist upon nearly identical facts in the prior case law:

> To prevail, McMillian must produce mandatory authority clearly establishing that, in 1987, it was unconstitutional for a law enforcement officer to seek a pretrial detainee's transfer to a more secure facility (even to death row of a nearby prison), while possessing the knowledge that the detainee's accomplice had been threatened by armed intruders actually breaking into a nearby county jail.

Pet. Cert. 27.

In support of this particularized notion, petitioner cites *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987). But *Anderson* and this Court's recent discussion of *Anderson* in *United States v. Lanier*, 117 S.Ct. 1219 (1997), make it clear that the petitioner is off base in this regard. As this Court said in *Lanier*, when discussing the level of specificity required from prior cases under the standard of clearly established law:

> In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. . . . But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional principle already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful." *Anderson*, [483 U.S.] at 640. As Judge Daughtery noted in her dissenting opinion in this case, "'the easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability.'"

117 S.Ct. at 1227-1228.

Similarly, even though no prior government officials apparently have been brazen enough to confine a pretrial detainee on Death Row -- of if they have, they have not been sued for it or the cases have never reached this Court or the Eleventh Circuit -- the unprecedent nature of this action does not mean petitioner Tate is immune from a lawsuit on this ground. Any reasonable law enforcement official is on notice that he or she cannot punish a pretrial detainee, and "[t]he

contours of [that] right," *Anderson*, 483 U.S. at 639-640, are sufficiently established that a government official should know he cannot place a pretrial detainee on Death Row for the purpose of punishment, even if the official claims the detainee needs protection.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

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